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Employer Immunity in Independent-Contractor Torts in Ohio

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THE RULE that *an employer is not liable for the tortious acts of an independent contractor working for him* seems clear and easy to apply. But within this seemingly simple statement lies a multitude of conflicting problems.

For example, Mr. Justice Rutledge has said of this that: ". . . it is enough to point out that with reference to an identical fact situation, results may be contrary over a very considerable region of doubt . . . depending upon the state or jurisdiction where the determination is made." [1] Moreover, the courts have grafted a number of "exceptions" onto the "rule" stated above, so that quite often an employer *will* be held liable for the torts of his independent contractor. In fact, the courts have developed so many exceptions to the rule that one judge commented that: ". . . it would be proper to say that the rule is now primarily important as a preamble to the catalog of its exceptions." [2]

With the introduction of exceptions into the picture, the problem begins to take shape.[3] The independent contractor situation differs from most other tort cases in that the employer usually is not the actual tortfeasor.[4] As the contractor is the one who commits the actual wrong, the employer is liable, if at all, only vicariously. One of the main questions becomes not *whether* the injured party shall recover, but *from whom* he shall recover. This is the question examined here.[5]

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1 National Labor Relations Board v. Hearst Publications, 322 U. S. 111, 122 (1944). Thus governmental immunity was extended to a contractor doing government work, in Pumphrey v. J. A. Jones Construc. Co., 94 N. W. 2d 737 (Iowa 1959).

2 Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 201 Minn. 500, 503, 277 N. W. 226, 228 (1937).

3 For a brief history of the rule and its exceptions, see Comment, 39 Yale L. J. 861 (1930). The independent contractor concept was virtually unknown in English common law until Bush v. Steinman, 1 Bos. and P. 404 (1799). Though repudiated by the court in Laugher v. Poenter, 5 B. & C. 547 (1826), with the case of Ellis v. Sheffield Gas Consumers Co., 2 E. & B. 767 (1853) the growth of the many exceptions began.

4 For a qualification of this statement, see text *infra*, dealing with cases concerning personal fault of the employer.

5 In this article it will be assumed that the independent contractor is the one who has the responsibility for completing the work, with little right of control reserved by the employer. See Firestone v. Industrial Comm'n., 144 Ohio St. 398, 59 N. E. 2d 147 (1945), for a complete discussion of the definition of an independent contract.

Personal Fault of the Employer

An employer is not immune from liability for a contractor's torts if it is found that the employer was personally responsible for the injury. This means that if the employer, by his own negligent action "caused" the damage, he will be liable, although he hired an independent contractor to do the work.

True, the employer's liability is not precisely "vicarious" in these instances, since the cause of action is based on his own negligence rather than that of the contractor. Still, as Mechem points out, the courts talk of these cases as though they were examples of vicarious liability. Thus it is necessary to include them in a discussion of the problem.[6]

Generally, if an incompetent contractor is chosen by the employer[7], or if the work to be done is considered illegal,[8] or if a dangerous instrumentality is furnished to the contractor,[9] the Ohio courts have stated that the employer must bear the loss. The basis of the decisions appears to be that if it is foreseeable that the work may be injurious to third persons the employer has a personal duty to prevent harm to them.[10] This sometimes is called "nondelegable duty." (See below.)

In the landmark case of *Covington and Cincinnati Bridge Company v. Steinbock and Patrick,* the question whether to relieve the employer from personal liability was squarely met.[11] There the defendant-landowner hired an independent contractor to tear down a wall for him. In the course of demolition the plaintiff's property was damaged. The court ruled that when danger to others is likely to accompany the doing of certain work unless extreme caution is taken, the employer has the duty to see that the job is done with approximate care. The landowner was deemed to be at fault in spite of a provision in the contract stating that he was not to be liable for injuries sustained as a result of the work.

In a modern counterpart of this case, the Ohio Supreme Court has reached a similar result. Although the court primarily dealt with the problem of indemnity between the contractor and his employer, in *Globe Indemnity Company v. Schmitt,* the court asserted that an occupier of premises, who maintains a covered opening in the sidewalk for his benefit, is answerable for injuries sustained by a plaintiff who falls into

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6 Mechem, Outlines of the Law of Agency, § 482 (4th ed., 1952).

7 Norris v. Citizens Publishing Co., 13 Ohio L. Abs. 177 (Ohio App. 1932), where the court indicated that if incompetency was shown, the employer would be liable.

8 Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590 (1858).

9 Jacobs v. Fuller & Hutsinpiller Co., 67 Ohio St. 70, 65 N. E. 617 (1902).

10 See also Railroad Co. v. Morey, 47 Ohio St. 207, 24 N. E. 269 (1890), where the court dealt with the case as though the defendant railroad was the one that actually injured the plaintiff, although a contractor was the actual cause of the plaintiff's injury.

11 61 Ohio St. 215, 55 N. E. 48 (1899).

the opening because of negligence on the part of an independent contractor.[12] The contractor had removed the cover in order to collect waste materials, and had failed to guard it while sweeping up.

If the plaintiff is aware of the potential danger he may encounter from work being done, he may have assumed the risk of possible injury.[13] This gives the employer a valid defense to any action brought for harm caused by the contractor's negligence. Or, where the plaintiff's damage is not the direct or natural consequence of the business being performed, the employer may be free of responsibility. As the court remarks in *Clark v. Fry*: "[I]f the thing which they [the employer-defendant] ordered to be done might have been done in a perfectly innocent and proper manner, they are not liable." [14]

Thus, while the employer's liability[15] often is a question of fact for the jury, it seems that the eventual outcome in the "personal fault" cases depends on how far the courts are willing to extend the duty of the employer. If it is foreseeable that harm will result from the risk he has created, the employer will be found "at fault" and directly responsible for the injuries which follow the performance of the work—apart from the fact that he delegated part of the job to an independent contractor. On the other hand, if it is found that the injury arises from the unforeseeable negligent act of the contractor alone, there usually will be no duty imposed on the employer. The court will call the negligence "collateral" to the work the employer ordered, and the independent contractor will be held liable because he alone created the danger.

Inherently Dangerous Work Created by the Employer

It is generally accepted that if an employer hires an independent contractor to do work which is "inherently dangerous," the employer will be held accountable for injuries received by a third person. The words "inherently dangerous" seem to imply that the employer has a duty to use due care to see that no one is hurt if the work itself is dangerous,[16] or if the instrumentality used is so dangerous that unless proper precautions are taken an injury probably will result.[17]

There are nineteenth-century Ohio cases which say that for failure to fence-in a cistern,[18] or to protect a ditch built across a

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12 142 Ohio St. 595, 53 N. E. 2d 790 (1944).

13 Wellman v. East Ohio Gas Co., 160 Ohio St. 103, 113 N. E. 2d 629 (1953).

14 8 Ohio St. 358, 382, 72 Am. Dec. 590, 598 (1858).

15 123 Ohio St. 304, 175 N. E. 207 (1931).

16 City of Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408 (1878).

17 Jacobs v. Fuller & Hutsinpiller, 67 Ohio St. 70, 65 N. E. 617 (1902).

18 Circleville v. Neuding, 41 Ohio St. 465 (1885).

public road,[19] or to cover a coal vault under a sidewalk,[20] the employer would be liable although the independent contractor was the actual wrongdoer. Taken together, they emphasize that if the job being done on the owner's property involves interference with free public passage on the streets, and if the work is inherently dangerous, the risk of loss can not be shifted to the independent contractor.

A modern synthesis of these decisions appears in the case of *Richman Brothers v. Miller*.[21] Richman Brothers engaged Ohio Edison to keep the store sign, overhanging the sidewalk, in a clean, workable condition. Ohio Edison, in turn, employed Walker to paint the sign. An employee of Walker's, while painting the sign, negligently dropped a paint bucket on a pedestrian passing below. The pedestrian sued Richman's for damages, and recovered. The court said that since the work presented a danger to the public the responsibility should be placed upon "the person who orders the work to be done to see that reasonable precautions are taken to prevent injury."[22]

The key question of the independent contractor-employer problem is presented in the *Richman* case—to what lengths will the courts go in upholding or destroying the employer's immunity? On the one hand, there is the fact that an employer has hired another to do work over which the employer can exercise little or no control. On the other hand, the work is being done for his benefit. The court must balance these elements.

In *Richman,* the Supreme Court quoted with approval Judge Minshall's opinion in the *Covington* case where he said that "the principles of distributive justice should force the employer to pay."[23] This seems to intimate that often the real basis for a decision holding the employer accountable rests on "public policy" grounds. Following this line of reasoning the Ohio Supreme Court has extended the employer's liability to include, not only dangerous work, but also dangers created because ordinarily safe work was negligently done.[24]

But the Ohio cases are not constantly "anti-employer." When the Maxwell Publishing Company arranged to have its building painted, no trouble of any sort was anticipated. There an employee of the painter hired to do the job took a screen door off its hinges to dry. He placed the door on the sidewalk. A breeze pushed the door over onto the plaintiff who was passing by.

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19 Railroad Co. v. Morey, 47 Ohio St. 207, 24 N. E. 269 (1890).

20 Hawver v. Whallen, 49 Ohio St. 69, 29 N. E. 1049 (1892).

21 131 Ohio St. 424, 3 N. E. 2d 360 (1936).

22 Richman Brothers Co. v. Miller, supra, note 21, at syllabus 2. Note that the language of the court is similar to that in the cases dealing with the employer's personal fault.

23 Covington & Cincinnati Bridge Co. v. Steinbock & Patrick, 61 Ohio St. 215, 229, 55 N. E. 618, 621 (1899).

24 Massachusetts Bonding Co. v. Dingle-Clark Co., 142 Ohio St. 346, 52 N. E. 2d 340 (1943).

Since there would have been no need to take special safety precautions if the work had been properly performed, the work was held not to be inherently dangerous.[25] The injury was said to be proximately caused rather by the separate negligent act of the paint-contractor's employee, and that negligence was merely collateral to the project of painting the building.

In another case,[26] the court thought that the harm did not occur from any act which the employer hired the independent contractor to perform. Consequently, when the plaintiff's hogs died from eating enamel which had been left on the ground by the contractor's workmen when they re-laid a pipeline for the gas company, the work was not "necessarily dangerous" enough to place the responsibility on the company. The injury was caused by negligence outside the scope of the work contracted for; therefore the gas company owed no duty of special care to the plaintiff.

The diverse results in the "inherent danger" cases can be summarized by applying a simple statement of law: the employer will be liable for risks connected with work which is a direct result of his orders and which is in itself dangerous; he will not be held responsible if the actions causing the injury were within the control of the contractor and not related to the job as contemplated by the employer; *i.e.*, the contractor being guilty of collateral negligence.

Cutting through these ambiguous distinctions, it is obvious that any work, no matter how dangerous, can be safely done. It is also clear that the contractor's acts are the ones that actually cause the injury. But, in Ohio, ever since the holding in the *Covington* case,[27] an employer has never been quite sure whether or not he may be held liable for a job he delegates to an independent contractor. The *Richman*[28] decision offered no ready answer to the problem, since it is conceivable that under similar facts a contrary result could be reached by a court today. However, the case did serve as a warning to the employer that he had better provide protection to third persons if there is even a remote possibility of harm occurring from work done in connection with his business.

The methods of protection open to the employer include liability insurance and selection of a dependable contractor. Yet these precautions are of no avail if a court considers it just that the employer pay for the harm done.

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[25] 43 Ohio L. Abs. 538, 61 N. E. 2d 816 (1945).

[26] Mercer v. Ohio Fuel Gas Co., 80 N. E. 2d 635 (1947), aff'd., 79 N. E. 2d 685 (1947).

[27] Covington & Cincinnati Bridge Co. v. Steinbock & Patrick, 61 Ohio St. 215, 55 N. E. 2d 618 (1899).

[28] Richman Brothers Co. v. Miller, 131 Ohio St. 424, 3 N. E. 2d 360 (1936).

Employer's Nondelegable Duties

Often a court will say that an employer is not immune from liability because he owed a "nondelegable duty" to the injured person. The fact that an independent contractor was hired will not negate this duty. Consequently, when the contractor fails to perform the work in a proper manner, even though the employer has exercised all the care that a reasonable, prudent man in his business would use, the employer's responsibility is considered too personal to pass on to the contractor.

A frequently cited example of a nondelegable duty arises when a statute requires a municipality, or a county, to keep a road in safe condition. Therefore, if a traveler is injured because of a rut in the road resulting from repairs by a contractor, the city can not claim immunity. It is liable under the state statute.[29]

Following this rationale, if streets are rendered unsafe because of excavations on abutting land, the landowner will not be relieved of liability for ensuing injuries merely because an independent contractor did the work.[30] The owner, like the municipality, has a nondelegable duty not to interfere with the right to use public thoroughfares.

But this is not the entire picture of an employer's nondelegable duties. An employer is frequently required to obtain a license before he may undertake a particular project. In these instances the courts have stated that if the activity will involve a danger to others, the duty to use due care cannot be delegated to a contractor. Such is the case in the trucking industry today, for example.

The usual problem is posed when an independent trucker leases his own truck to a common carrier who is authorized by federal and state authorities to carry freight. The independent trucker, in effect, carries the freight for the carrier without receiving permission from any regulatory body. If the trucker is on a haul for the carrier and negligently injures another, the question of who is responsible inevitably arises.

Assuming that the court considered the trucker to be the carrier's independent contractor, it could easily apply traditional agency doctrine and insulate the carrier from liability. But, as the trucking industry has expanded, the courts have found it desirable to impose a duty upon the carrier which may not be shifted by delegation.

As early as 1926 an Ohio Court of Appeals held that an authorized carrier owed a nondelegable duty to the public and could not release itself from liability for negligent acts com-

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[29] Circleville v. Neuding, 41 Ohio St. 465 (1885), where the city's duty arose from what is now Ohio Rev. Code § 723.01; Whitney v. Niehaus, 4 Ohio App. 208, 28 C. P. 518 (1915), where the county was said to have a nondelegable duty based on what is now Ohio Rev. Code § 305.12.

[30] Hawver v. Whalen, 49 Ohio St. 69, 29 N. E. 1049 (1892); Railroad Co. v. Morey, 47 Ohio St. 207, 24 N. E. 269 (1890).

mitted within the scope of its operations as a common carrier.[31] In that case, at the time of the collision the trucker, using his own tractor, had rented a trailer from the carrier and was carrying freight for him. Although the carrier urged that the trucker was an independent contractor on his own business, the court ruled that public policy required that the carrier be held to have a nondelegable duty to the public.

The same decision was reached when the carrier had no state authorization, although the trucker-contractor who was at fault was an authorized carrier.[32] The explanation given was that "the general public affected by the increased hazard has a right to expect . . ." the liability to rest with the carrier.[33]

Public policy does not always serve as a simple answer to the problem. In *Wood v. Vona,* after the independent trucker had finished his run for the carrier and was returning home, he negligently hit the plaintiff.[34] The Ohio Supreme Court expanded the public policy concept and ruled that, because the carrier was required by state law to carry liability insurance,[35] the policy would be liberally construed in order to satisfy the legislative intent to protect the general public from loss caused by the negligence of the carrier or his independent trucker. Since the return trip was as necessary as the delivery, the trucker was said to be still working for the carrier.

Under similar facts, a federal court sitting as an Ohio court expressed the opinion that it was absurd to make a distinction between a loaded and an empty truck.[36] Trucking was considered a dangerous enough activity so that a nondelegable duty of care was imposed on the carrier.

A contradictory result was reached when an independent trucker, operating under the carrier's permits, had delivered his load and had turned homeward. Before starting on his way, he stopped for a drink. On the trip back the trucker negligently ran into the plaintiff. The authorized carrier was found not liable for the accident, since the trucker-independent contractor had entirely completed his job for the carrier.[37] From the moment of completion the carrier's responsibility ceased.

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31 Liberty Highway Co. v. Callahan, 24 Ohio App. 374, 157 N. E. 708 (1926).

32 Duncan v. Evans, 134 Ohio St. 46, 17 N. E. 2d 913 (1938).

33 Stickel v. Erie Motor Freight, Inc., 54 Ohio App. 74, 79, 6 N. E. 2d 15, 17 (1936).

34 Wood v. Vona, 147 Ohio St. 91, 68 N. E. 2d 80 (1946).

35 Ohio Rev. Code § 4923.08. Interstate Commerce Act, Part II, 68 Stat. 526 (1954), 49 U. S. C. § 315 (Supp. 1959) also requires public liability insurance as a prerequisite to issuance of authority to operate as an interstate carrier.

36 American Transit Lines v. Smith, 246 F. 2d 86 (6th Cir. 1957).

37 Simon v. McCullough Transfer Co., 155 Ohio St. 104, 98 N. E. 2d 19 (1951); *cf.* Thornberry v. Oyler Brothers, Inc., 164 Ohio St. 395, 131 N. E. 2d 382 (1955). In the latter case the independent trucker unloaded his goods and before returning home made a freight haul for his personal profit. See also Spangenberg, Agency Problems in Motor Carrier Cases, 6 Clev-Mar. L. R. 130 (1957); and below, note 39.

The court cited with approval an earlier Ohio decision which declared that the liability of carriers exists only through the course of any transportation project undertaken by the carrier.[38] This seems to be a desirable result. The activity for which the carrier's franchise was required did not contemplate the trucker's drinking as part of the contract.[39]

The problem had become more complicated in the Ohio courts by reference in some decisions to "Rule No. 4" issued by the Bureau of Motor Carriers of the Interstate Commerce Commission.[40] The Rule provided that when an independent trucker leased a truck to the common carrier, the carrier had to have the right to direct and control the operation of the truck at all times and be fully responsible to the public for the wrongs done by those acting for the carrier.

The language used in the Rule was generally in line with the principles employed to decide earlier independent contractor-employer cases. But in two recent Ohio cases the Supreme Court interpreted Rule No. 4 as requiring a master-servant relation between the trucker-lessor and the carrier-lessee.[41] The court applied the doctrine of *respondeat superior* and remarked that "Rule No. 4 makes the driver of an independent contractor furnishing equipment to a shipper . . . the employee or servant of the shipper, so far as the public is concerned."[42]

Applying *respondeat superior* as derived from Rule No. 4 to the "return trip" situations, if the "servant" made a deviation outside the scope of the "master's" business, the "master" would not be held liable. But it is questionable whether an independent trucker can automatically be considered a servant since he may be in business for himself, with men working for him.[43] Besides, any such determination will depend largely on the facts of each case and the inclination of the particular court.

More important, regardless of whether the trucker is called a servant or an independent contractor, the carrier is liable to a third person for the negligence of an employee, because of I. C. C. Rule No. 4.[44] Since the trucker uses the carrier's freight hauling permits, and exhibits them on the side of his truck, the pub-

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38 Behner v. Industrial Comm'n., 154 Ohio St. 433, 96 N. E. 2d 403 (1951).

39 For further comment on this problem see Sloan, Liability of Carriers for Independent Contractors' Negligent Operation of Leased Motor Trucks, 43 Iowa L. Rev. 531, 543 (1958); and Spangenberg Article above in note 37.

40 Administrative Rule No. 4, Bureau of Motor Carriers, I. C. C. (1936) as amended (1939), and authorized by the Interstate Commerce Act, Part II, 54 Stat. 919 (1940), 49 U. S. C. §§ 301-327 (1951).

41 Thornberry v. Oyler Brothers, Inc., 164 Ohio St. 395, 131 N. E. 2d 382 (1955); Shaver v. Shirks Motor Express Corp., 163 Ohio St. 485, 127 N. E. 2d 355 (1955).

42 Ibid.

43 Sloan, supra note 39, at 548 to 550.

44 See 7 West. Res. L. R. 226, 227 (1956); and articles cited above in notes 37 and 39.

lic thinks that it is dealing with the carrier, not the independent contractor.

Conclusion

The public's concept of the employer's duty, as interpreted by the courts, is the one idea that ties together the cases cited. If the independent contractor's negligent acts are considered to be within the contemplated scope of the business, the employer's responsibility is fixed—he had a duty not to subject the plaintiff to an unreasonable risk of harm, failed in his duty, and must pay the loss. But if the acts of the independent contractor are thought to be unusual or impractical means for accomplishing the employer's work, the employer is said to owe no duty of care to the injured person and is immune from liability.

Of course, any concept of *duty* must necessarily change as new socio-economic pressures arise. At the time of *Clark v. Fry*[45] in 1858, it was important for industry to expand. Therefore, the employer had to be given greater freedom to "farm out" parts of his work to an independent businessman.

At the time of the *Richman Brothers*[46] decision in 1936, the commercial world had changed. Business had increased to tremendous wealth and power. There now was evident an "undoubted conviction of our people . . . that a business must pay the reasonable cost of its passage."[47] The principle that only the one actually "at fault" must bear the loss was vanishing, and a desire to assure compensation for the innocent victim became important. Since the employers of America were reaping huge profits, it was felt that they should pay for the injuries as a necessary part of their business.

Thus "enterprise liability" evolved as a direct consequence of the complex economic factors that the modern industrial world had created.[48] It has been suggested by Harper and James that, by placing tort liability on the employer, accident prevention would be emphasized by the employer, the plaintiff would be provided with a greater assurance of being compensated, and the accident loss would be distributed by business among the public.[49] This reasoning, along with the fact that the person most likely to carry and afford accident insurance would be the

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[45] 8 Ohio St. 538, 72 Am. Dec. 590 (1858).

[46] 131 Ohio St. 424, 3 N. E. 2d 360 (1936).

[47] Smith, Scope of the Business: The Borrowed Servant Problem, 38 Mich. L. R. 1222, 1248 (1940).

[48] See Harper & James, Law of Torts § 26.5 (1956). Douglas, Vicarious Liability and Administration of Risk, 38 Yale L. J. 584, 594, 600 (1928) asserts that the employer has the best chance of shifting the risk since he has a wider public to which to pass the loss. He does state, however, that the independent contractor can best prevent the accident since he controls the equipment at the time of the injury.

[49] Harper & James, Law of Torts 1373 (1956).

employer—the contractor being smaller and often less reliable—makes a solid argument for finding the employer liable.

In spite of this rationale, it must be remembered that there is nothing automatic about the employer's liability. The independent contractor is a practical necessity for many businesses that could not function without one, *i.e.*, the trucking industry. If the contractor's torts have no reasonable relation to the business, it is proper to insulate the employer. His business did not create the risk. Rather the collateral negligence of the contractor caused the injury and it is he who should bear the loss.

Viewing the exceptions to the employer's immunity, it is apparent that no one case can be definitely placed under one specific exception. For example, the *Richman Brothers*[50] case could fall within all three exceptions: the nature of the work was inherently dangerous; Richman's had a nondelegable duty to refrain from interfering with the public right to safe use of the streets; Richman's was personally liable because by ordering the sign painted there was a possibility of injuring someone.

Therefore, even with the aid of these conclusions, there is still no safe basis for predicting how the Ohio courts will hold in any particular case. "Though it would seem highly desirable for the courts to confine nonliability [of the employer] to a few exceptional cases . . . [T]his the American courts have not yet done." [51]

This statement is representative of the situation in Ohio today. Although it is undeniably true that deep inroads have been made upon the employer's immunity, it is also true that the traditional rule is still alive and used in Ohio decisions.

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[50] 131 Ohio St. 424, 3 N. E. 2d 360 (1936).

[51] Harper, Law of Torts, 646 (4th ed. 1940).